IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 119 of 2020
[In the High Court at Suva Criminal Case No. HAC 376 of 2018]

BETWEEN : **TAITUSI ROKOSUKA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Mr. Z. Zunaid for the Respondent**

Date of Hearing : **06 July 2022**

Date of Ruling : **07 July 2022**

RULING

[1] The appellant had been charged in the High Court of Suva on one count of aggravated burglary contrary to section 313(1)(a) of the Crimes Act, 2009 and one count of theft contrary to section 291(1) of the Crimes Act, 2009 committed on 02 October 2018 at Suva in the Central Division.

[2] The charges were as follows.

'Count 1
Statement of Offence
Aggravated Burglary: contrary to section 313(1)(a) of the Crimes Act 2009.

Particulars of Offence

Taitusi Rokosuka, with others, on the 02 nd day of October 2018, at Suva in the Central Division, in the company of each other, entered into the property of Zhang Shu Qi, as trespassers with intent to commit theft.

Count 2
Statement of Offence
Theft: contrary to section 291(1) of the Crimes Act 2009.

Particulars of Offence

Taitusi Rokosuka, with others, on the 02 nd day of October 2018, at Suva in the Central Division, in the company of each other, dishonestly appropriated $38,850.00 cash (FJD), 2 x Huawei brand mobile phones without sim cards, 1 x Huawei brand mobile phone with sim-card, 1 x Lenovo brand laptop, 1 x Acer brand laptop, 1 x ladies watch, 1 x Hisence brand 32 inch TV, 1 x black Adidas canvas, 1 x black New Balance canvas, 1 x softpad green and yellow canvas, 1 x black hood, 1 x yellow jacket, 2 x black Calvin Klein round neck t-shirts, 3 x vests in packet (1 green, 1 grey and 1 black in colour). 1 x 32 inch sast brand flat screen TV and 1 x blue Adidas bag containing 2 x BH 20 cigarettes, 1 x light blue and white USB, 1 x $25 recharge card, 1 x sim card and 1 x black pocket wifi, the properties of Zhang Shu Qi, with intention of permanently depriving Zhang Shu Qi of the said properties.

[3] After the appellant had pleaded guilty to both counts having accepted the summary of facts, the learned High Court judge had convicted the appellant on his own plea of guilty and sentenced him on 23 January 2020 to an aggregate sentence of 06 years and 06 months (effectively 05 years and 02 months after deducting the period of remand) subject to a non-parole period of 04 years.

[4] An untimely appeal (09 September 2020) against conviction in the form of grounds of appeal and written submissions had been lodged in person by the appellant. He had filed an application for bail pending appeal on 21 September 2020. The State's submissions had been tendered on 20 December 2021. Thereafter, the appellant had filed an application for enlargement of time against sentence along with an affidavit and written submissions coupled with an application for bail pending appeal (02 June 2022).

[5] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[6] Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained [vide **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100)].

[7] The delay in conviction appeal is substantial (about 06 ½ months) while sentence appeal is late by more than 02 years and 03 months. The appellant had not explained the delay for his conviction appeal while he has decided to canvass the sentence after the respondent filed its written submissions and dealt with the issue of tariff regarding sentence. Nevertheless, I would now see whether there is a **real prospect of success** for the belated grounds of appeal against conviction and sentence in terms of merits [vide **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019]. The respondent has not averred any prejudice that would be caused by an enlargement of time.

[8] The guidelines for a challenge to a sentence in appeal are that the sentencing magistrate or judge (i) acted upon a wrong principle or (ii) allowed extraneous or irrelevant matters to guide/affect him or (iii) mistook the facts or (iv) failed to take into account some relevant consideration (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011). For a ground of appeal untimely preferred against sentence to be considered arguable at this stage (not whether it is wrong in law) on one or more of the above sentencing errors there must be a real prospect of its success in appeal.

[9] The grounds of appeal raised by the appellant are as follows.

Conviction

'***Ground 1***

That the trial Judge considered equivocally plea of an accused appellant where he remanded in custody 1 year 3 months by mistake and under pressure pleaded guilty on the above charges.

<u>Ground 2</u>

That the presiding Judge failed to direct the State to amend or correct the charge of aggravated burglary where the sentencing Judge partly declare in sentencing page 6 paragraph 6, a person who enters a building with one or more other person as a trespasser with the intention to steal, commits an offence of aggravated burglary. This definition was cited with approval by the Supreme Court in Lalagavesi v The State (unreported) CAV 14 delivered on 24th October 2012).

Sentence

<u>Ground 3</u>

That the learned trial Judge may have erred in law by imposing a sentence deemed harsh and excessive without having regard to the sentencing guideline and applicable tariff for the offence of aggravated burglary.

<u>Ground 4</u>

That the learned sentencing Judge erred when his Lordship took into consideration and adopted irrelevant matters as aggravating features to enhance the sentence. Thus the sentence was passed on an error of law.

<u>Ground 5</u>

That the sentencing Judge erred in imposing a non-parole term when in fact there is no parole board in place to give effect to the non-parole term imposed.

01st ground of appeal

[10] The gist of the appellant's complaint is that his guilty plea was equivocal and tendered out of frustration for having been in remand for a considerable time.

ly1] The appellant represented by counsel for the Legal Aid Commission (LAC) had pleaded not guilty on 04 December 2018. His grounds to challenge the cautioned interview had been submitted by LAC to court on 25 February 2019. State had filed *voir dire* disclosures on 16 April 2019. On 07 May 2019, 'Agreed Facts' had been signed by counsel for both parties, the appellant and the trial judge. The trial was set to last from 20 - 24 January 2020.

[12] Just before the commencement of the trial, the appellant in person had pleaded guilty and the respondent had filed a summary of facts which were read and understood by the appellant. It is not clear at what stage the appellant had opted to defend himself.

[13] The respondent has submitted that during the pre-trial conference the appellant assisted by his counsel had agreed to the recoveries of some stolen items as identified by the complainant from his possession and his home. The summary of facts, which had the appellant's cautioned interview and the record of previous convictions attached therein, had been read over in open court and admitted by the appellant.

[14] It was stated by the High Court of Australia in **Meissner v The Queen** [1995] HCA 41; (1995) 184 CLR 132):

> *"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."*

[15] The trial had already been fixed from 20 - 24 January 2020. The appellant had pleaded guilty presumably on the first date of the trial. Thus, if he could wait from 2019 until the date of the trial there could not have been any desperation on account of any delay of proceedings on his part forcing him to plead guilty which it appears to me is the result of his realization that a conviction was inevitable. Thus, his guilty plea cannot be attributed to such desperation.

[16] In **Ali v State** [2012] FJSC 2; CAV0006.2006 (9 February 2012) the Supreme Court said as follows.

> *16. There is no ambiguity of pleas in this case. I have no doubt that with his experience of the courts, and the relative simplicity of the elements of the offence or robbery with violence Aiyaz Ali had the correct intelligence as to the applicable law and the facts that he accepted were true. This was not a case where on the evidence disclosed Aiyaz Ali had a good defence. See the cases and*

summary in Archbold 44th Edition (1992) at 4.90 and Blackstone 2011 at para D12.93 for the applicable principles.

17.The common law relating to involuntary pleas of guilty was developed in the English case of ***Turner v. R*** *(1970) 2 QB 321 and the principles to be applied have been developed in the years since 1970.*

18.What Blackstone (2011) states at paragraph D12.94 is as follows:

> *"**D12.94** A plea of guilty must be entered voluntarily. If, at the time he pleaded, the accused was subject to such pressure that he did not genuinely have a free choice between 'guilty' and 'not guilty', his plea is a nullity (**Turner** [1970] 2 QB 321). On appeal, the Court of Appeal will have the same options as it has when a plea is adjudged ambiguous, namely that it must quash the conviction and sentence but will be able, in its discretion, to issue a writ of venire de novo for a retrial as the original proceedings constitute a mistrial.*
>
> *Pressure to plead may come from a number of sources: the court, defence counsel or other factors. Whatever the source, the effect is the same".*

[17] The appellant was not a novice to court. He had had two previous convictions for robbery with violence and aggravated robbery. From the summary of facts, I cannot see that appellant had any good defense. Nor can I say that he did not genuinely have a free choice between 'guilty' and 'not guilty'. Appeal record does not suggest that he was under any pressure to plead guilty. The trial judge had satisfied himself that the appellant's plea was voluntary and free and unequivocal tendered having understood the consequences.

[18] This appeal ground has no real prospect of success.

02nd ground of appeal

[19] The appellant argues that the trial judge should have directed the prosecution to amend the charges based on what the judge had stated at paragraph 6 of the sentencing order.

[20] The element of 'in the company of each other' is established by the appellants' cautioned interview and the summary of facts. Thus, there was nothing wrong in the manner in which charges had been framed.

[21] There is no merits in this ground of appeal.

03rd ground of appeal

[22] The appellant argues in his submissions that the learned High Court judge had erred in applying the tariff of 06 years to 14 years ('new tariff') for aggravated burglary in sentencing the appellant following **State v Prasad** [2017] FJHC 761; HAC254.2016 (12 October 2017) and **State v Naulu** - Sentence [2018] FJHC 548 (25 June 2018) without applying the long-established 'old tariff' of 18 months to 03 years.

[23] The Court of Appeal in **Leqavuni v State** [2016] FJCA 31; AAU0106.2014 (26 February 2016) had applied the 'old tariff' to the appellant who had been sentenced in May 2013 for an offence of aggravated burglary committed in December 2012 (both prior to the pronouncement of the 'new tariff' in October 2017). In **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018) the Court of Appeal applied the 'old tariff' to the appellant who had been sentenced on 13 November 2017 (after the pronouncement of the 'new tariff' in October 2017) for an offence of aggravated burglary committed in January 2016. In both cases the offence had been committed prior to the date of the decision in ***Prasad*** *i.e.* 12 October 2017. In the current case the offences had been committed on 02 October 2018 and sentences meted out on 23 January 2020 after the decision in ***Prasad.***

[24] A Similar ground of appeal had been considered in the recent past in **Vakatawa v State** [2020] FJCA 63; AAU0117.2018 (28 May 2020), **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020), **Leone v State** [2020] FJCA 85; AAU141.2019 (19 June 2020), **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020), **Naulivou v State** [2020] FJCA 166; AAU0043.2019 (9 September 2020) and **Cama v State** [2021] FJCA 175; AAU42.2021 (27 October 2021).

[25] Therefore, there is no need to reiterate what has already been stated in those decisions regarding the issues relating to the so called 'new tariff'. For reasons given in detail, it was held in ***Daunivalu*** in reference to the 'new tariff' of 06-14 years of imprisonment for aggravated robbery purportedly set in ***Prasad*** and ***Naulu*** that

> *'………, there is a fundamental question of legal validity of the 'new tariff'.*

[26] Unfortunately, far from ensuring uniformity and consistency in sentencing which a sentencing tariff is expected to achieve, the 'new tariff' has had the unintended contrary effect on the sentences passed for aggravated burglary since ***Prasad*** by polarizing the judicial opinion whether to apply the 'old tariff' or the 'new tariff' among High Court judges and Magistrates; some of whom preferring to follow the former and the others the latter causing a great deal of confusion among offenders and the lawyers as well. This has defeated the underlying rationale of and is in direct conflict with the declared legislative intention behind section 8(2) of the Sentencing Act which compels a court considering the making of a guideline judgment to have regard to (a) the need to promote consistency of approach in sentencing offenders and (b) the need to promote public confidence in the criminal justice system.

[27] Therefore, to that extent the appellant is entitled to argue that he should be given enlargement of time to appeal to canvass his sentence before the full court. What is at stake could be considered a question of law as well.

[28] However, though the learned trial judge had applied the 'new tariff' in sentencing the appellant and picked 06 years as the starting point, the ultimate question is whether or not it fits the gravity of the crime. This is undoubtedly a serious case of aggravated burglary involving theft of substantial amount of money and property belonging to a foreign national engaged in business in Fiji.

[29] The appellant who had 02 previous convictions against his name should be mindful that it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [**Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[30] The State is seeking a guideline judgment on sentencing tariff for aggravated burglary in another appeal ready to be taken up before the full court in the near future and with the assistance of that guideline judgment, the full court may also consider if the aggravating circumstances of the case justify the departure from the 'old tariff' of 18 months to 03 years of imprisonment to decide whether the appellant's sentence of 06 years and 06 months should be interfered with and if so, to what extent.

[31] However, in view of the question of law on the issue of sentencing tariff for aggravated burglary which is yet to be resolved by the Court of Appeal or the Supreme Court, I am inclined to grant enlargement of time to appeal against sentence.

02nd ground of appeal

[32] The appellant based on the decision in **Kean v State** [2011] FJSC 11; CAV0015.2010 (12 August 2011) paragraph [32] submits that the aggravating factors taken into account by the trial judge were part of the elements of the offence of aggravated burglary and should not have been considered to enhance the sentence. He argues that pre-planning, non-recovery of most of stolen money and two previous convictions should not have been considered as aggravating factors.

[33] Pre-planning and non-recovery of most of stolen money could have aggravated the offence. However, two previous convictions could not have been considered to enhance the sentence as the appellant had already been punished for these offences and as a result of those convictions he was not entitled to any discount for being a first time offender.

[34] It is for the full court to decide, while there was an error in treating two previous convictions as an aggravating factor, whether the error could have made a significant difference to the ultimate sentence.

03rd ground of appeal

[35] The appellant's contention is that the trial judge had erred in fixing a non-parole period when the Parole Board is not fully functional.

[36] There is no sentencing error committed by the trial judge due to the Parole Board not being fully functional. Making it fully functional is a matter for the executive.

[37] This ground of appeal has no merits at all.

Bail pending appeal

[38] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on 'exceptional circumstances' including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004*)*, **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

[39] Out of the three factors listed under section 17(3) of the Bail Act 'likelihood of success' would be considered first and if the appeal has a 'very high likelihood of success', then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.

[40] If an appellant cannot reach the higher standard of 'very high likelihood of success' for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of 'very high likelihood of success'.

[41] I have allowed enlargement of time to appeal against sentence due to the issue concerning the tariff adopted by the trial judge but I cannot at this stage determine what sentence the full court would impose on the appellant. Therefore, I cannot say that there is a very high likelihood of success in his appeal against sentence in the sense that his sentence would be drastically reduced particularly given the serious nature of the offending and his previous convictions.

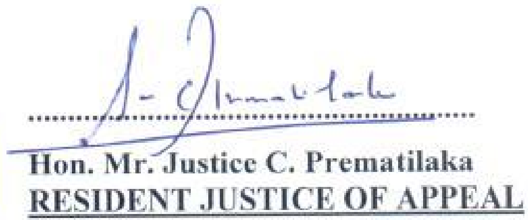
[42] Though, it is now not technically required, I shall still consider the second and third limbs of section 17(3) of the Bail Act namely '*(b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard*' together.

[43] The appellant has served 02 years and 05 ½ months in imprisonment. Given that the sentencing tariff for aggravated burglary is likely to be reset most probably upwards by the full court at the earliest opportunity in a guideline judgment there is no risk of the appellant having to serve a sentence longer than he deserves if he is not enlarged on bail pending appeal at this stage. Further, given that the full court hearings are now back to normal the appellant's appeal is likely to be heard sooner than later. Therefore, the interest of justice is not served by considering section 17(3) (b) and (c) in favour of the appellant at this stage.

[44] Therefore, I am not inclined to allow the appellant's application for bail pending appeal and release him on bail at this stage.

Order

1. Enlargement of time to appeal against sentence is allowed.
2. Bail pending appeal is refused.



Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL